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C. R. McCorkle, of Appalachia, and *E. M. Fulton*, of Wise, for plaintiff in error.

Bullitt & Chalkley and *R. T. Irvine*, all of Big Stone Gap, for defendant in error.

DENNY *v.* DENNY.

Nov. 11, 1915.

[86 S. E. 835.]

1. Divorce (§ 37*)—Grounds—Cruelty.—Cruelty on the part of a husband, resulting in the wife's enforced separation from his bed and board, and continued for three years prior to the decree, entitles the wife to a divorce as for desertion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-134, 136-138; Dec. Dig. § 37.* 4 Va.-W. Va. Enc. Dig. 736.]

2. Divorce (§ 298*)—Custody of Children—General Rule.—Where the ages of the children, the financial condition of the parties, and the other facts and circumstances show no sufficient reason for departing from the general rule, the father, upon the granting of a divorce, is entitled to the custody of the children, subject to such provisions as the court may make as to allowing the wife access to the children at prescribed times and places.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 781-787; Dec. Dig. § 298.* 4 Va.-W. Va. Enc. Dig. 752.]

Appeal from Circuit Court, Augusta County.

Suit for divorce by Imogen B. Denny against Victor L. Denny. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Jeffries & Jeffries and *O. L. Shackelford*, all of Norfolk, and *C. M. East*, of Staunton, for appellant.

Timberlake & Nelson, of Staunton, for appellee.

FRANKLIN PLANT FARM, Inc. *v.* NASH et al.

Nov. 11, 1915.

[86 S. E. 836.]

1. Landlord and Tenant (§ 76*)—Assignment of Lease—Consent by Landlord.—Under a lease forbidding subletting without the written consent of the lessors, the acts of the lessors in procuring their wives to sign the original lease so that the assignee would accept the assignment, in accepting rent from the assignee and receiving

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therefor, and in allowing the assignee to insure buildings and requesting him to pay premiums, constituted an assent to the assignment of the lease for the unexpired term upon the same conditions as had been agreed to by the original lessee, though there was no written consent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225-230; Dec. Dig. § 76.* 9 Va.-W. Va. Enc. Dig. 193.]

2. Landlord and Tenant (§ 76*)—Assignment of Lease—Execution of Deed of Trust.—Under a lease forbidding assignment except upon written consent of the lessors, the execution by the lessee of a deed of trust on the leasehold interest did not constitute an assignment of the lease, where no sale under the deed had been made, where no change of possession had taken place, and where no purchaser had been put in position to take possession under the deed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 225-230; Dec. Dig. § 76.*]

3. Landlord and Tenant (§ 180*)—Unlawful Dispossession—Damages.—Where a lessee under a lease giving the lessors, in case of default, the right to re-enter and to take and retain fixtures and improvements constructed by the lessee, was unlawfully dispossessed by the lessors, an instruction in trespass that in assessing damages the jury might consider the value of the improvements, special damages suffered by the lessee, including damages to his personal property, and damages to his business, correctly stated the measure of damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 715-729; Dec. Dig. § 180.*]

4. Trial (§ 253*)—Instructions—Ignoring Evidence.—Where a lessee, under a lease giving the lessors, in case of default, the right to re-enter and to take and retain fixtures and improvements constructed by the lessee, was unlawfully dispossessed by the lessors, an instruction in trespass correctly stating the measure of damages for determinable money losses sustained by plaintiff, but ignoring evidence as to the willful and oppressive manner in which defendants secured possession, which constituted grounds for punitive damages, was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. Damages (§ 91*)—Punitive Damages—Grounds.—While a tort committed by mistake in the assertion of a supposed right or without actual wrong intention and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others will not warrant punitive damages, where the wrongful act

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is done with a bad motive or with much gross negligence as to amount to positive misconduct, or in a manner so wanton and reckless as to manifest a willful disregard of the rights of others, the plaintiff, in an action to recover damages from the wrongful act, may recover, not only determinable money loss, but such punitive damages as are called for by the circumstances of the case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.* 5 Va.-W. Va. Enc. Dig. 748.]

Error to Circuit Court of City of Norfolk.

Action by the Franklin Plant Farm, Incorporated, against F. F. Nash and another in trespass. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

FRENCH et al. v. CHAPIN-SACKS MFG. CO., Inc.

Nov. 11, 1915.

[86 S. E. 842.]

1. Waters and Water Courses (§ 77*)—Pollution—Actions—Burden of Proof.—In a suit to enjoin the alleged pollution of a stream, the burden rested on complainants to establish the allegations of their bill by a preponderance of the evidence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 65, 66; Dec. Dig. § 77.* 13 Va.-W. Va. Enc. Dig. 672.]

2. Appeal and Error (§ 41*)—Decisions Appealable—Statutory Provisions.—Under Code Supp. 1910, § 3454, authorizing appeals of writs of error when any person thinks himself aggrieved by a final judgment, decree, or order in any civil case, the complainant may appeal from a final decree refusing an injunction, notwithstanding section 3438, providing that, when a circuit or corporation court, or a judge thereof, refuses to award an injunction, a copy of the proceedings and the original papers, with any orders entered in the proceedings, may be presented to a judge of the Court of Appeals, who may thereupon award an injunction, as the right to appeal from a final decree or decree adjudicating the principles of the cause is the same in a case for equitable relief by injunction as in other equity cases, and it was plainly not the purpose of the Legislature to ingraft an amendment on the general statute by implication.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 127-155, 157, 158, 172, 178-184, 186-188, 190, 194, 196, 197; Dec. Dig. § 41.* 1 Va.-W. Va. Enc. Dig. 437.]

Appeal from Circuit Court, Shenandoah County.

Suit by G. Mark French and others against the Chapin-Sacks

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.